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ABSTRACT

Articles in this newsletter discuss the increasing abridgements of the Fifth Amendment right to remain silent rather than make self-incriminating statements; the power of the Federal Communications Commission to put broadcasters out of business, as demonstrated in the Star case; and a case in which three members of the Young Socialist Alliance were charged with criminal trespass and "violation of the rules" of Central Michigan University, for distributing political literature at that institution. Other items include a brief statement regarding the court conviction of a publisher of a pornographic magazine and news about publications that deal with issues related to freedom of speech. (GW)

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FREEDOM OF SPEECH NEWSLETTER

Volume III
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June 1977

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FREEDOM OF SPEECH NEWSLETTER
Michael P. Kelley, Editor
Harry Sharp, Associate Editor

Volume III: Number 3
June 1977

The Deteriorating Right to Silence*
Herman Cohen 3

SCA Committee Announcement 6

FCC Imposition of the Death Sentence: The Star Case
Milan D. Meeske 7

News and Notes 13

The Case of Three Young Socialist Alliance Members at Central Michigan University
prepared by the Committee for Free Speech 14

California Library Association Condemns Hustler Decision 15

Convention Preview
Winfred G. Allen, Jr. 15

* Paper presented in absentia at the 1976 W.S.C.A. Convention, San Francisco, November 1976.

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Special Thanks to the Department of Speech Communication, California State Polytechnic University, San Luis Obispo for making possible the duplicating and mailing of this issue of the Newsletter.

We must be aware that an important communication right -- the right not to speak -- has been severely curtailed and that we need to think about the personal and professional consequences.

THE DETERIORATING RIGHT TO SILENCE: ABRIDGEMENTS OF FIFTH AMENDMENT FREEDOMS

by

Herman Cohen

The Pennsylvania State University

This paper is predicated on the assumption that although, as a profession, we have, over the years, increased our interest in freedom of speech, most of our concern has been with so called "First Amendment freedoms" -- our freedom to speak freely and openly without prohibition or punishment. Much less attention has been directed to our corollary communication right -- the right to remain silent -- our freedom under the Fifth Amendment to choose not to testify against ourselves. Although scholars of Law, Political Science and civil libertarians have shown interest in these questions we scholars in human communication have almost ignored the notion that freedom of speech includes the freedom not to speak. We must consider that if we cannot be compelled to remain silent we also cannot be compelled to speak.

With that justification in mind allow me to turn to the main point of this paper which is to explain, in brief compass, the premises behind the principle of freedom from self incrimination and to point out the ways in which that freedom has been eroded, particularly in the past seven or eight years. By the time I finish, perhaps you will share with me the view that our rights, especially our political, social and personal rights, as free men and women have been diminished and are under constant and continuing threat. For some of the historical facts in this presentation I am indebted to Professor Leonard W. Levy's works Origins of the Fifth Amendment and Against the Law: The Nixon Court and Criminal Justice and to a series of articles by Richard Harris in the New Yorker in April 1976. The interpretations and conclusions are mind, however, and I bear full responsibility for them.

Perhaps I should begin by reviewing precisely what it is we are talking about. After all, discussion of the questions of "The Fifth" is no longer general. Only those who are senior academic citizens even recollect the fuss about it in the days of Senator Joseph McCarthy. The irony is that our rights have been severely abridged since those days even though much less is said about them.

The relevant language in the Fifth Amendment to the Bill of Rights to the Constitution of the United States is that no one "shall be compelled in any criminal case to be a witness against himself". The limitation to criminal cases may seem to be pretty restrictive. Few of us will stand trial accused of crimes. We need to remind ourselves, however, that "criminal cases" include such matters as questioning by the police, legislative investigations, grand juries, and bureaucratic inquiries as well as criminal trials.

We also need to notice that the amendment is stated unconditionally. It is not followed by qualifying addenda such as "unless he is given immunity from prosecution". The freedom from self incrimination is stipulated as an absolute right. Many of us have found that difficult to understand. We have held the view that a person who chooses not to testify against himself must have something to hide and therefore must be guilty of something. During the McCarthy days even President Eisenhower supported this view when he said "I must say I probably share the common reaction: If a man has to go to the Fifth Amendment, there must be something he doesn't want to tell". This popular presumption of guilt has hindered popular and informal dis-

cussion of the Fifth Amendment.

Protestation against self-incrimination is not a new or radical concept nor was it new or radical when the Fifth Amendment was adopted as part of the Bill of Rights. It was amended only slightly after its introduction by James Madison and passed without debate. In fact, eight of the colonies had included prohibitions against self-incrimination in their constitutions after 1776. The principle was, in fact, deeply imbedded in English Common Law and had been operative, although not always effectively, since the seventeenth century. "Nemo Tenture procedere seipsum", "No man is bound to betray himself" was an accepted principle in Britain at the time of the American Revolution. Both in Britain and in the colonies the courts assumed that protection against self-incrimination did not in any sense, imply guilt. The views had been held in both countries that a right to privacy existed; that a right to protect one's reputation existed -- a person should not be compelled to reveal those facts which might defame him even though he was innocent; that person should not be compelled to reveal those facts which might lead to conviction for a crime when the accused did not know that a crime had been committed.

These assumptions were soon validated by Justice Marshall in Marbury vs. Madison in 1803 and in the treason trial of Aaron Burr in 1807. In the latter case Marshall said, "If the question be of such a description that an answer to it may or may not criminate (sic) the witness ... it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact." Absolute protection was provided by our judiciary until 1857 when Congress, in investigating its own alleged misbehavior passed an "immunity statute" that protected any witness who was compelled to testify "before either house of Congress or any committee of either house" from prosecution for "any fact or act touching which he shall have testified". Confessions of misdeeds were so rampant under the immunity statute that Congress repealed the statute in 1862 and replaced it with a narrower "use immunity" statute which provided not full immunity from prosecution but only immunity from use of the specific evidence extracted. The law was expanded in 1868 to cover some federal judicial proceedings. It was further extended to give the same power in 1887 to the Interstate Commerce Commission. The "use immunity" statute was declared unconstitutional by the Supreme Court in 1890 in Counselman vs. United States. In a unanimous decision the court held that the Fifth Amendment privilege is limited to criminal matter but is as broad as the mischief which it seeks to protect". The court went further to state, "We are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating (sic) question put to him can have the effect of supporting the privilege conferred by the Constitution of the United States". The court held that for a law to be a substitute for the Fifth Amendment it would have to provide "absolute immunity against future prosecution for the offense to which the question relates".

I dwell on this bit of history for good reason. In this chain of events several precedents were established. For the first time in our national history legislative limitations were put on our right to remain silent. "Use immunity", although declared unconstitutional in 1890, was first enacted and was to be resurrected in the Nixon Administration. For the first time the Supreme Court held that a law could substitute for the Fifth Amendment and that the amendment was not applicable if immunity from prosecution were granted. This ruling seems a curious one. The Congress was free to abridge our rights under the Fifth Amendment when the purpose of the Bill of Rights was to put these rights beyond the reach of the legislature.

As we might expect, Congress quickly understood the message. Sixteen days after the decision in Counselman a "transactional immunity" statute was enacted which required testimony if full immunity from prosecution were granted.

Further limitations were imposed by the Supreme Court in 1908 in Twining vs.

New Jersey which held that any protection against self-incrimination was applicable only in federal jurisdictions and was not guaranteed to citizens of individual states unless specifically provided for by state law. In 1936 in Brown vs. Mississippi the court held that state coerced confessions were not in violation of the Fifth Amendment.

Only under the Warren Court were these abridged rights partially restored. In 1964 the Fifth Amendment became applicable to the states in Malloy vs. Hogan. Miranda vs. Arizona in 1966 guaranteed a criminal suspect's right to remain silent. In Murphy vs. Waterfront Commission in 1964 the court ruled that when a person was forced to testify in one jurisdiction his testimony could not be used to prosecute him in another jurisdiction. In 1967 the court struck down yet another congressional use immunity statute. Statements from Justices Douglas and Black perhaps best exemplify the spirit of the Warren Court. Justice Douglas wrote, "the right of silence is beyond the reach of Congress". Justice Black said, "The value of these privileges is largely destroyed if people can be penalized for relying on them" Some of you will remember, however, that these decisions and statements were greeted by indignant outcries from politicians, police, press and people.

The partial reestablishment of the Fifth Amendment rights was remarkably brief. President Nixon, early in his administration, appointed four new justices to the Supreme Court whose views were in polar opposition to those of the Warren Court. The new Chief Justice Warren E. Burger, for example, as a judge on the Court of Appeals for the District of Columbia had often attacked Fifth Amendment sanctions. The decisions of the Burger Court combined with congressional legislation quickly reduced our Fifth Amendment protections to the lowest point in our national history. The threat to our rights is severe, continuing and possibly irreducible. This erosion has not been widely noted nor generally discussed.

Without beirg unduly alarmist allow me to outline the actions which have been taken in recent years and which deserve our attention. Early in the Nixon administration Attorney General John Mitchell ordered a study made of altering the Fifth Amendment. A decision was made to reintroduce use immunity, which had been rejected time after time by the Supreme Court since 1892, as part of the Organized Crime Control Act of 1970. In the law and order atmosphere of that period the act passed with almost no opposition. In spite of previous decisions the Burger Court upheld use immunity thirteen times in two years. In none of the cases was organized crime the subject of inquiry.

Under the Act of 1970 the accused could not be prosecuted on the basis of evidence independently gathered or on the testimony of others. We, as citizens accused by our government, have almost no way of knowing whether the evidence used against us was developed independently or whether our testimony was used as a lead to further inquiry. Under use immunity the coerced testimony of A can be used to prosecute B and the coerced testimony of B can be used to prosecute A. Under use immunity almost no rights to remain silent remained.

Those few remaining rights were truncated by two additional Supreme Court decisions. In Harris vs. New York in 1971 the court held that although statements made by a suspect before he has been informed of his right to remain silent may not be used against him, they may be used to "impeach his credibility". The effect of this ruling was to prevent a person who had made such statements from speaking in his own defense.

In Kastigan vs. United States, in 1972, the court, in an opinion written by Justice Powell, held that transactional immunity was <u>too broad</u> and that use immunity was "coextensive" with the Fifth Amendment and a "proper substitute for it." Several consequences followed the Kastigan decision. Many states enacted use immunity statutes. Attorney General Mitchell instructed United States Attornies to cooperate with the FBI by subpoenaing, before grand juries, those who refused to talk on political matters. Within eighteen months of the Kastigan decision the Department of

Justice was called upon to grant immunity in over 5000 cases -- many of them political. In contrast, the Department of Justice had granted immunity fewer than 50 times up to the mid 1960's.

This, then, is the situation today. Of course the volatile political atmosphere of the past decade has dissipated. John Mitchell and Richard Nixon are no longer in power. A new administration waits in the wings. Nevertheless, we have little reason to feel safe and secure in our right not to be forced to speak against ourselves. The Burger Court still sits and it is not likely to reverse itself. The precedents of the decisions of 1970, 1971 and 1972 weigh heavily. The question of civil rights, let alone the Fifth Amendment was hardly an issue in the 1976 presidential campaign.

Even in these seemingly tranquil days we must be aware of the conditions of our freedom and of present and potential threats to it. We must recognize that any person can be summoned before a grand jury, a court or a legislative committee and forced to answer all questions put to him. We must also recognize that if the political climate in this country changes the opportunities for political oppression are immediate. I fear that we can do little to change the situation. We must, however, be aware that an important communication right -- the right not to speak -- has been severely curtailed and that we need to think about the personal and professional consequences.

SCA COMMITTEE ANNOUNCEMENT

"Toward More Responsible Government Communication"

The SCA Committee on Accountability and Responsibility in Governmental Communication offers to aid those SCA members interested in sponsoring resolutions on government/political communication for consideration by the Legislative Council at the annual convention in Washington, D.C., December 1-4, 1977.

The Committee offers to coordinate these resolutions for possible co-sponsorship, suggesting possible re-wording in some cases, and to facilitate their orderly presentation to the Legislative Council. Of course, no formal or substantive changes would be made without the consent of the initial sponsor.

Members should send such resolutions (in triplicate) to the following address before October 1, 1977:

Dr. Richard L. Johannesen
Chairperson, SCA Committee on Accountability/
Responsibility in Governmental Communication
Department of Speech Communication
Northern Illinois University
DeKalb, Illinois 60115

The excesses of government are a constant threat to freedom of expression and the power of the FCC to put a broadcaster out of business is not to be taken lightly.

FCC IMPOSITION OF THE DEATH SENTENCE: THE STAR CASE

by

Dr. Milan D. Meeske

Florida Technological University

From the start of government regulation of broadcasting, many have contended that the power of the Federal Communications Commission (FCC) to take away a station license constitutes censorship. If a license is cancelled or revoked because of what has been said, or not said on the air, it is difficult to argue that a form of censorship has not been imposed. Yet, the courts have held that neither the Communications Act nor the Constitution prevents the Commission from looking into either program content or technical matters when considering license deletion. As the controversy continues, legal scholar Robert O'Neil may have best identified the problems of FCC license deletion when he wrote:

> The hard questions relate to the extent of that power, the manner of its exercise, the sanctions imposed in particular cases, and the substantive standards the Commission imposes in pursuit of the "public interest."[1]

The most severe sanctions the Federal Communications Commission can use against an errant broadcaster are license revocation or denial of an application for license renewal. Broadcasters call these sanctions "death sentences" for the result is loss of license. Because of the drastic nature of these sanctions, they have seldom been used, except in the most extreme and flagrant cases.

But that may be about to change. Broadcasting magazine reports that some 100 licenses and permits were deleted by the FCC in its first 38 years. However, more than 20 licenses were taken from broadcasters in the last two years.[2] It is worth noting not only the increase in deletions but the manner. The largest part of the 20 recent deletions came in two FCC actions. One took nine licenses from the Alabama Educational Television Commission for failure to employ blacks and to program them. The Alabama ETV Commission, however, was allowed to reapply for the licenses.[3] In the other case, the FCC invoked the "death sentence" in a manner believed to be unprecedented in severity. In a single proceeding the FCC denied applications for renewal of all stations, three AM's and two FM's, licensed to Star Stations, Inc.[4] The U.S. Court of Appeals affirmed the Commission's order[5] and the U.S. Supreme Court declined to review the ruling. Burden was not allowed to reapply for the frequencies.

These cases, particularly the Star case, seem to reflect a clear warning to broadcasters that the FCC will do more than impose fines or issue short-term license renewals in cases it considers serious. It will exact the ultimate administrative penalty, the "death sentence", to deal with errant licensees. The purpose of this paper is to review the FCC policies permitting the deletion of licenses, to examine the particular facts of the Star case, and to consider the implications of "death sentence" punishment by the FCC.

FCC LICENSE DELETION POWERS

A broadcaster is not granted a license to operate a station for as long as he pleases. This stems from the fact that the Communications Act of 1934 empowers the

Federal Communications Commission to grant licenses for a period of three years and to award them only if the "public interest, convenience, and necessity" would thereby be served.[6] At the end of the three-year licensing period, the licensee must apply for renewal and the station's past record is taken into account to determine if the "public interest" has been served.[7]

The Commission has used the following rationale to justify deleting licenses where the issue involves program content. Even though the Communications Act prohibits censorship, the Commission maintains that the Act refers only to the use of prior restraint. Thus, if the FCC would refuse to allow a broadcaster to air a specific program, that would be considered censorship. However, to review a station's past programming operations, considered as a whole, to determine if the station has operated in the "public interest" during its license period, is not censorship since no prior restraint is involved. Although it may be argued that this is a narrow definition of "non censorship" it has been consistently upheld by federal courts whenever the license renewal issue is raised.

FCC LICENSE DELETION REGULATION

Section 312 of the Communications Act gives the Commission authority to revoke broadcast licenses or construction permits to construct stations. Statutory grounds for license deletion include false statements in applications, violations of Cease and Desist Orders, willful and repeated failure to operate substantially as set forth in the license, violation of the statutes against fraud, obscenity, and lotteries, and conditions coming to the attention of the Commission which would warrant refusing to grant a license.[8]

The Commission may revoke a license before renewal time. In a revocation proceeding, the Commission bears the burden of proof. For that reason, the Commission has often administered legal sanctions against the offending station by refusing to grant renewal. Refusing renewals requires only a finding that the refusal would serve the public interest, convenience, and necessity. Administratively, the Commission thus finds it easier to not renew licenses than to revoke them.[9] That is what the Commission did in the Star Case.

In granting a license, and in determining if it can be renewed, the Commission is also permitted to judge the legal, financial and technical competencies of the licensee. Moreover, the Commission is empowered to consider general character qualifications of those seeking licenses or operating stations. Since the use of a publicly owned channel is in the nature of a public trust, the Commission has placed great importance to elements of character such as honesty and reliability, moral, financial and social responsibility and respect for law and order.[10] There are no specific rules to define what constitutes adequate character qualifications to operate broadcasting stations in the public interest. Each case must stand on its own merits and be decided in terms of the particular facts involved.

In the Star case, the Commission imposed the "death sentence" on all five stations for reasons related to character. The Commission wrote:

> We have found that the record demonstrates a reprehensible course of misconduct involving the basic character qualifications of Burden and Star, clearly warranting their disqualifications from operating these broadcast facilities. In view of such pervasive misconduct, we have concluded that the public interest, convenience, and necessity could not be served by the grant of Star's renewal applications.[11]

Thus, even though most of the alleged misconduct involved WIFE and KISN the Commission found Burden and Star lacking the basic character qualifications to continue operation of any of the five stations.

THE STAR CASE

In the proceeding, the Commission consolidated the renewal applications of Star Stations of Indiana, Inc. for WIFE and WIFE-FM, Indianapolis, Indiana; Central States Broadcasting, Inc. for KOIL and KOIL-FM (changed to KEFM), Omaha, Nebraska; and Star Broadcasting, Inc. for KISN-AM, Vancouver, Washington. Also involved in the proceeding was the application for a construction permit filed by Indianapolis Broadcasting, Ind. (IBI) for a new AM station on WIFE's frequency in Indianapolis, which was mutually exclusive with the WIFE renewal application.

The history of the litigation is long and complex. The Commission based its decision on a history of alleged misconduct on the part of Mr. Burden dating back to 1964. Thirty issues were specified by the Commission in its designation order[12] or by enlargement of issues[13] to determine the basic qualifications of all applicants and the comparative merits of the WIFE and IBI proposals.

In his Initial Decision, Administrative Law Judge Chester F. Naumowicz, Jr. granted all of the renewal applications except that of WIFE which he denied. He granted IBI's application for a construction permit in Indianapolis.[14] The Commission, however, overruled Judge Naumowicz on all counts except the ruling in favor of IBI. The Commission said Judge Naumowicz had not given proper consideration to the past misconduct of WIFE. Because of one misdeed or another, the Commission noted, WIFE-AM-FM had not received a full three-year license since Mr. Burden acquired the stations in 1963.[15] This circumstance, said the Commission, must be given substantial weight in considering the likelihood of future compliance by all of the Star Stations.

The Commission focused largely on allegations that Mr. Burden used his stations improperly to favor political candidates of his choice in 1964 and 1966. During the 1964 Senatorial Campaign in Indiana, Mr. Burden favored Senator Vance Hartke (D-Ind.). Ron Mercer, general manager of WIFE from 1963 to 1965 testified that Mr. Burden told him that Senator Hartke would help with some FCC problems if WIFE would give him publicity on each newscast and run some free advertising. Burden maintained that Mercer was responsible for preferential treatment given Senator Hartke and that Mercer duped Mr. Burden. Judge Naumowicz rejected all of Mercer's testimony but the Commission reversed that finding. The Commission concluded that Burden had knowledge of a scheme which involved a sham contract to cover up the fact that free time was being given to Hartke; and that the scheme included the slanting of WIFE's news to provide favorable coverage of the candidate.[16]

A case of similar misconduct was found at KISN. Burden favored Oregon's Republican governor, Mark Hatfield, in a successful Senate race in 1966. The Commission held that Burden made an illegal corporate gift of $1,000 to Hatfield's campaign and that Burden endeavored to provide one-sided coverage of the campaign. After extensive examinations of both cases, the Commission concluded:

> In both the 1964 and 1966 campaigns, newscasts were used as a vehicle to publicize Burden's preferred candidate - not as an exercise of news judgement, but as a deception of the public and to further his private interests. Criminal provisions of Federal statutes governing corporate gifts to candidates were disregarded. Such attempts to use broadcast facilities to subvert the political process cannot be ignored or condoned.[17]

The Commission also identified a number of other matters believed to have a bearing on Burden's likely future conduct. These matters included attempts to frustrate the Commission's processes by intimidating and harrassing employees and former employees of Star; contest improprieties at WIFE and WIFE-FM after hearings had been designated to examine such matters at KOIL and at WPDQ, Jacksonville, Florida, whose owner was being counseled by Burden on how to conduct promotional

contests; an alleged attempt to influence the action of local officials when KISN undertook to move its transmitter site by contributing $10,000 to their campaign funds; and charges that Burden gave gifts and favors to the president of a broa cast rating firm.[18]

The Commission noted that while these deviations may not be disqualifying in and of themselves, "they form part of a pattern of misconduct which demonstrates that Burden and Star cannot, or will not, assume and discharge the minimal obligations of a Commission licensee."[19] The Commission said it found no evidence of future compliance with the public interest standard requisite to satisfy the minimal qualifications for renewal. "In view of the pervasive and continuing misconduct demonstrated in Burden's operation of his stations," the Commission concluded, "it is clear that Star and Burden lack the requisite qualifications to be licensees of this Commission . . ."[20]

The vote was 5-to-1, with Commissioner Benjamin Hooks not participating. Commissioner Robert E. Lee was the lone dissenter. He called the decision an "unprecedented example of an overdose of justice." Lee said the majority should not have reversed the findings of the Administrative Law Judge, who after evaluating the evidence and particularly the credibility of the witnesses found that something less than the "death sentence" was called for. By the Commission's action, he wrote "we are effectively bankrupting the licensee and probably denying him a livelihood in his field of expertise."[21] Commissioner James H. Quello, a former broadcaster, concurred "reluctantly." He called the Commission action "harsh in the extreme" but said he could find no evidence in the record to warrant any other conclusions.[22]

After the Supreme Court refused to review the ruling, the Commission gave Burden 90 days to wind up operation at the stations. It also approved Burden's sale of WIFE-AM to IBI. Mr. Burden made several ette pts to continue operation of the remaining stations until an interim operator could be named. The requests were refused, however, by both the FCC and U.S. Court of Appeals. As a result, WIFE-FM, Indianapolis, KOIL-AM-KEFM Omaha, and KISN Vancouver, shington, ceased operation at 12:01 a.m., September 2, 1976, by FCC order.

CONCLUSIONS

Does the FCC's license deletion policy, as illustrated in the Star Case, constitute censorship? When the Commission's decision is weighed against its traditional rationale for deleting a license because of program issues the answer is no. The Commission did force the closing of five stations and the sale of another, but the action did not come about through prior restraint. Instead, the Commission based its decision on past programming practices, considered at license renewal, to conclude that Burden lacked the necessary character qualifications to continue operation of the stations. The Commission, then, seems to have carried out its mandate to make certain that licensees operate in the public interest.

Still, there are questions. While the decision does not constitute censorship by prior restraint, the method and extent of the decision raises questions of indirect censorship. There are several questions regarding the methods used by the FCC. A significant question is why the Commission allowed the sale of WIFE-AM, the station charged with the bulk of the infractions, while the remaining stations were closed down giving Burden no opportunity to recover his investment in them. The answer lies in the operational structure of the FCC which has administrative, legislative, and judicial functions. The Commission allowed IBI to file a competing application for WIFE-AM before the Commission consolidated renewal applications (another method subject to question). In his Initial Decision, the Administrative Law Judge granted all of the renewal applications except that of WIFE-AM. The full Commission, however, denied all renewals and granted the application of IBI. Was the method for the convenience of the FCC? Was Burden given an equal opportunity

to defend each station? Is the corporation to be considered at fault because of wrongdoing by some stations licensed to the operator? These and similar questions illustrate the methods the FCC can use, prior to judicial review, to reach a decision.

Another question concerns the burden of proof during license deletion. Should the licensee bear the burden in license deletions or should the burden be on the Commission? As noted earlier, administratively it is easier for the FCC not to renew licenses and place the burden on the licensee. It may be argued that this is appropriate since a licensee operates on a publicly owned channel and, if need be, should prove that he is serving the public. However, when the Commission imposes a full "death sentence" on an operator, and puts him out of the broadcasting business, should not the Commission use the revocation process where it must prove that its action is serving the public?

One must also ask whether there are alternative methods of administering the "death sentence." If a licensee abuses his privilege to use a frequency should he be forced out of business by the government with no means of regaining his investment? Of more importance, should the public be deprived of stations while the wheels of government turn? The answer is no, and in fact, the Commission has pointed to the solution in the Star case by denying renewal of the WIFE-AM license but permitting sale of the station. In this manner, the station never left the air and the public was not deprived of service. Yet, the offender was punished but allowed to regain his financial investment. The Commission could accomplish the same goal by using forced sale of stations in flagrant cases. Either approach seems to better serve the public and is more in keeping with the philosophy of a democratic society.

The extent of the Commission's license deletion power also raises constitutional issues. The Commission found Burden unfit to operate any of his stations primarily because of misdeeds at two of them. It is true that where the facts raise questions of character and suggest inability to operate a station in the public interest, the licensee must prove that he does have the ability and can meet the requirements of the law. But, does misconduct at one or more stations require closing of all stations licensed to an operator? If so, this premise assumes that misconduct at one station makes a licensee unfit to operate any station. Senator William Proxmire (D-Wis.) is one who believes this approach is excessive. Of the Star decision he wrote:

> For the Government to punish is for the Government to control thought. What other Government agency can directly order a business to stop, to cease operating? Even in antitrust matters, where corporations are found guilty of price fixing and are fined millions of dollars, there is no direct order to stop functioning as a business. And in those antitrust cases, the freedom of speech and of a free press--the freedom of thought--is not involved.[23]

The Star decision clearly indicates that the First Amendment is not an absolute guarantee with respect to broadcasting. Broadcast licensees can be forced out of business and the public can have fewer stations to listen to while the stations are silent. Freedom of expression is certainly involved and will be for some time. Interim operators have been named for the silent frequencies but they will tread lightly lest they offend the Commission and damage opportunities to obtain permanent licenses. Competitive applications have been filed for the frequencies and history has shown the resolution of such casex to be lengthy. In the meantime, it is the public who will feel the effects of the Commission's decision.

Government can abuse its power by determining who shall speak just as readily as it can determine what is said. Imposition of the "death sentence" by the Federal Communications Commission is just such an example. The power of the FCC to exact

the ultimate penalty may be more than a democratic society can tolerate and might better be left to the federal courts which are less susceptible to political and budgetary pressures exerted by both the executive and legislative branches of government.[24] There is a fine line between government punishment of an errant broadcaster and service to the public by a government agency. The excesses of government are a constant threat to freedom of expression and the power of the FCC to put a broadcaster out of business is not to be taken lightly.

Footnotes:

1. Robert M. O'Neil, Free Speech. Responsible Communication Under the Law (New York: Bobbs-Merrill, Inc., 1972), p. 58.
2. Broadcasting (Sept. 13, 1976), p. 9.
3. Alabama Educational Television Commission, 50 FCC 2d 461 (1975).
4. Star Stations of Indiana, Inc. et al. 51 FCC 2d 95 (1975).
5. Star Broadcasting, Inc. et al. Supreme Court Records and Briefs, 751246, March 3, 1976. Petition for writ of cert. to the U.S. Court of Appeals for the District of Columbia Circuit.
6. 47 USC sec. 308(a) (1964).
7. 47 USC 307(b) (1964).
8. 47 USC sec. 312(a) (1964).
9. Sydney Head, Broadcasting In America (Boston: Houghton Mifflin Co., 1972), p. 360.
10. 47 USC sec. 308(b). All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station ... The Commission, at any time after filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked.
11. 51 FCC 2d 97.
12. Order of the Commission, FCC 70-1256 (corrected), released December 15, 1970: and redesignated under FCC 72-148, released February 24, 1972.
13. Memorandum Opinions and Orders of the Review Board, 28 FCC 2d 488 (1971), and 34 FCC 2d 632 (1972).
14. FCC 73D-6, released February 14, 1973. Judge Naumowicz wrote "On issue after issue the ultimate conclusion has been that the charge has been unsubstantiated. Conjecture, suspicion and speculation have been substituted for fact." p. 164. On the comparative issues between WIFE and IBI, Naumowicz found the choice to be very close. He concluded that Burden was not aware of news slanting but failed to retain effective control of the station. p. 169.
15. 51 FCC 2d 96-7. WIFE was charged with violating Section 351(b) of the U.S. Code which states that station charges to legally qualified candidates for public office shall not exceed the charges made for comparable use of the station for other purposes and that WIFE violated 18 USC 610 which forbids corporate contributions on behalf of candidates for federal office. Judge Naumowicz ruled that Mercer gave false testimony under oath thus damaging his credibility. The Commission disagreed.
17. Ibid., at 107.
18. Ibid., at 107-8.
19. Ibid., at 108.
20. Ibid.
21. Ibid., at 112.

22. Ibid., at 112-3.
23. "FCC Tells Broadcasters What to Broadcast: Appeal Unlikely," Congressional Record - Senate, Vol 122, (Washington: Government Printing Office, June 10, 1976), pp. 8919-20.
24. See Erwin G. Krasnow and Lawrence D. Longley, The Politics of Broadcast Regulation (New York: St. Martins Press, 1973).

THE CASE OF THREE YOUNG SOCIALIST ALLIANCE MEMBERS
AT CENTRAL MICHIGAN UNIVERSITY

Prepared by the Committee for Free Speech*

On the evening of October 20, 1976, Brigid Douglas, Jim Garrison, and Tom Smith attended a public meeting held at Warriner Auditorium, Central Michigan University, where former CBS correspondent Daniel Schorr spoke on "The Values of a Free Press." More than 1,000 students and non-students were in the audience.

Smith, Garrison, and Douglas, who are members of the Young Socialist Alliance, distributed election campaign literature for the Socialist Workers party presidential and senatorial candidates, and they staffed a display table with books, pamphlets, and newspapers explaining the political views of the Socialist Workers party and the Young Socialist Alliance.

After the meeting had ended, members of the CMU Department of Public Safety arrested Smith, Garrison, and Douglas on a charge of criminal trespass. The three were taken to the Isabella County jail in Mt. Pleasant where they were booked on that charge and later released from custody on $25 bond each.

On the following day, new warrants were issued by the Isabella County prosecutor's office for the re-arrest of Smith, Garrison, and Douglas on two additional counts each of criminal trespass and three counts each of "violation of the rules" of CMU "so as to constitute an unreasonable prevention, or disruption, of the customary and lawful function of the institution, by occupying space necessary therefore or by use of force or by threat of force." Smith, Garrison, and Douglas were arraigned in state district court on all of these charges on October 25.

All totalled, Smith, Garrison, and Douglas each face possible penalties of up to six months in jail and a $1,650 fine.

A pre-trial hearing was held on January 20. No trial date has been set.

According to a Bill of Particulars submitted by the prosecution on February 1, the charges against Smith, Garrison, and Douglas are based on their election campaign activity both at Warriner Auditorium on October 20 and at the University Center on October 19 and 20. They are alleged to have violated university regulations concerning the use of university facilities and distribution of literature.

The regulations in question place severe restrictions on who can engage in political activity, and when and where such activity can take place. They are not related to preventing disruptions of the educational process, but are in fact designed to short-circuit that process by giving the university the power to censor ideas. Such regulations have been declared unconstitutional by federal courts on several occasions.

Despite the unconstitutionality of the regulations, Smith, Garrison, and Douglas made every effort to comply with them. Their efforts were nullified by the obfuscation of university officials and by the vagueness of the regulations themselves.

CMU officials chose to apply university regulations in the case of the three socialists in a completely arbitrary and discriminatory manner. One week earlier, Republican state legislative candidate John Engler distributed campaign literature on the CMU campus without making any effort to obtain permission, but he did not encounter any problem with the CMU administration. And on October 28, Democratic senatorial candidate Donald Reigle spoke in Warriner Auditorium while his supporters distributed campaign literature both inside and outside the auditorium -- the very place where the socialists were arrested!

The American Civil Liberties Union of Michigan, through cooperating attorney Ronald Reosti, is providing legal assistance to Smith, Garrison, and Douglas.

A lawsuit has been filed in federal district court in Michigan on behalf of Smith, Garrison, and Douglas, the CMU chapter of the Young Socialist Alliance, and

other CMU students, demanding that the university regulations restricting political activity on campus be declared unconstitutional and that an order be issued to prevent CMU officials from enforcing them. A decision is expected later this year.

The Committee for Free Speech is a non-partisan group formed to build public support for the defense of Smith, Garrison, and Douglas. It seeks sponsorship from all supporters of civil liberties. Sponsorship in no way implies agreement or endorsement of the political views of Smith, Garrison, and Douglas. The committee is demanding that all charges against Smith, Garrison, and Douglas be dropped.

* The sponsors of the Committee for Free Speech are too lengthy to reproduce, but include the American Civil Liberties Union of Michigan.

CALIFORNIA LIBRARY ASSOCIATION CONDEMNS *Hustler* DECISION

From the minutes of the CLA Intellectual Freedom Committee, February 23, 1977

WHEREAS, the courts have imposed the extraordinary sentence of 7 - 25 years or $10,000 fine on Larry Flynt, publisher of *Hustler*, and

WHEREAS, the Supreme Court decision of "present community standards" was used by prosecutors to manipulate this conviction, and

WHEREAS, we believe that the first amendment rights of all citizens and the Bill of Rights and its dictum that "Congress shall make no law abridging the freedom of the press" have been abridged by the conviction of Larry Flynt, and

WHEREAS, Mr. Flynt was prosecuted under the questionable Ohio conspiracy law,

THEREFORE BE IT RESOLVED that the California Library Association condemns this extraordinary sentence and the resulting abridgement of first amendment rights, and

BE IT FURTHER RESOLVED that this resolution, upon passage by CLA Council, be made available to appropriate news media, the Intellectual Freedom Office of the American Library Association, the prosecutor's office in the city of Cincinatti, and such other group or individuals as the California Library Association office deems appropriate.